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No. 97-1235

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**In The**  
**Supreme Court of the United States**  
**October Term, 1997**

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**CITY OF MONTEREY,**  
*Petitioner.*  
vs.

**DEL MONTE DUNES AT MONTEREY, LTD. AND**  
**MONTEREY-DEL MONTE DUNES CORPORATION,**  
*Respondents.*

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**On Writ of Certiorari to the**  
**United States Court of Appeals for the Ninth Circuit**

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**BRIEF OF**  
**DEFENDERS OF PROPERTY RIGHTS,**  
**ALLIANCE FOR AMERICA**  
**AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

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July 31, 1998

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## **QUESTION PRESENTED**

Whether trial by jury is guaranteed for all claims  
under 42 U.S.C. § 1983?

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Pursuant to Rule 37.3 of the Rules of this Court,

*amici curiae* submit this brief in support of Respondents.<sup>1</sup>

Both parties have consented to the filing of this brief.

**INTEREST OF AMICI CURIAE**

**Defenders of Property Rights** is a non-profit, public

interest legal foundation dedicated to the preservation of

constitutionally protected property rights. Defenders'

mission is to protect those rights considered essential by the

Framers of the Constitution and to promote a better

understanding of the relationship among all the rights

protected under the Bill of Rights. Defenders' goal of the

vigorous protection of property rights recognizes the special

role of federal courts in protecting those rights. Since its

founding in 1991, Defenders has participated in every

significant property rights case in this Court including

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<sup>1</sup> No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* (their

*Phillips v. Washington Legal Found.*, No. 96-1578, 1998

U.S. LEXIS 4003 (U.S. Jan. 20, 1998); *Suitum v. Tahoe*

*Regional Planning Agency*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 1659 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

**Alliance for America** is a non-profit coalition of grassroots groups all across the country dedicated to making property rights a part of environmental decision-making.

The Alliance represents over five hundred local organizations comprised of ranchers, teachers, homemakers, loggers, farmers, and other private individuals interested in protecting private property rights. The Alliance firmly supports the need to balance safeguarding the environment with guaranteeing the private property rights enshrined in the Constitution.

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members or counsel) contributed financially to the preparation of this brief.

## STATEMENT OF THE CASE

This case involves the alleged deprivation of rights to due process, just compensation, and equal protection secured by the Fifth and Fourteenth Amendments to the U.S.

Constitution under color of state law in violation of 42 U.S.C. § 1983. The violations of Section 1983 arise from the attempts of a property owner to develop a 37-acre parcel of unimproved land located in the City of Monterey, California.

At trial, a jury awarded \$1.45 million in damages for the temporary taking, under color of state law, of Respondent's property rights secured by the Fifth and Fourteenth Amendments. Pet. App. 3.

On appeal, Petitioner argued that Respondent had no right to a jury trial under either 42 U.S.C. § 1983 or the Seventh Amendment to temporary taking claims founded upon the Fifth and Fourteenth Amendments. The Ninth Circuit rejected Petitioner's argument, concluding instead that the district court properly allowed the claims to go to the

jury. Pet. App. 10. The court below reasoned that even though Section 1983 is silent on the issue, allowing jury trials under the statute is consistent with Congress' intent in passing the law. Pet. App. 7-8. Moreover, the court below also examined Seventh Amendment jurisprudence, and found that claims that are analogous to common law actions are entitled to be tried by a jury. Pet. App. 8-9. Thus, the court below concluded that Respondent's Section 1983 claim was properly tried by a jury:

More important than the nature of the claim is the second inquiry: the type of remedy sought. . . . Del Monte seeks compensatory or "legal" damages. . . . Because legal relief is available and legal rights are asserted, we conclude that Del Monte's inverse condemnation action is an 'action at law' . . .

Pet. App. 9 (citing *Del Monte Dunes, Ltd. v. City of Monterey*, 95 F.3d 1422, 1427 (9th Cir. 1996)) (citations omitted).

## SUMMARY OF ARGUMENT

In enacting 42 U.S.C. § 1983 as a statutory cause of action to protect civil rights, Congress saw the role of federal courts as uniquely important in achieving this goal:

The very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law. . .

*Mitchum v. Foster*, 407 U.S. 225, 243 (1972).

Congress viewed the role of federal courts as essential in protecting civil rights; a floor statement by Representative Lowe concerning Section 1 of the Ku Klux Act of 1871, the predecessor of Section 1983, explicates the thinking of Congress in passage of the law: "The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42<sup>nd</sup> Cong., 1<sup>st</sup> Sess., App. 68

(1871), quoted in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 725 (1989).<sup>2</sup>

The constitutional right to a trial by jury embodied in the Seventh Amendment enhances the role of courts in accomplishing their role in the protection of individual rights by providing a check against biased judges.<sup>3</sup> See, e.g., Alexander Hamilton, *The Federalist* No. 83, 562 (J. Cooke ed. 1961)(stating that the right to a trial by jury serves as a check or “barrier to the tyranny of popular magistrates.”); see also Rep. Gerry urging “the necessity of Juries to guard against corrupt Judges,” 2 *Records of the Federal Convention* 587 (Max Farrand ed., 1911).

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<sup>2</sup> Not only has Congress expressed support for the notion that federal courts play an important role in protecting individual rights, so did the Framers of our Constitution: “But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society . . . Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice . . .” Alexander Hamilton, *The Federalist* No. 78, 488-489 (Henry Cabot Lodge ed., 1888).

<sup>3</sup> The Seventh Amendment states that, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-

In recognition of the importance of the right to a trial by jury in our constitutional system of individual rights and liberties, this Court has broadly construed the reach of the Seventh Amendment. See *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 749 (D.C. Cir. 1995)(“Given the importance of the constitutional right to a jury trial, we will require a new trial when that right is erroneously withheld ‘except in the rare instances in which denial of a jury demonstrably was harmless error.’”)(citing 9 Wright, Miller & Cooper § 2322, at 175).

Further, and consistent with the constitutional purpose of the Seventh Amendment, this Court has repeatedly held that, regarding statutory claims for damages that “sound basically in tort” and which are “analogous to a number of tort actions recognized at common law,” the Seventh Amendment right to a jury trial applies. See, e.g., *Curtis v. Loether*, 415 U.S. 189, 195 (1974)(“[W]hen

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examined in any Court of the United States, than according to the rules of common law.” U.S. CONST. amend. VII.

Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts . . . a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.”) and *Pernell v. Southall Realty*, 416 U.S. 363 (1974)(upholding the Seventh Amendment guarantee for a jury trial in an action for the recovery of real property where analogous actions existed at common law).

Section 1983 is a statutory cause of action that this Court has described as “a species of tort liability.” *Heck v. Humphrey*, 512 U.S. 477, 483 (1994). This Court has also held that Section 1983 is to be interpreted against a “background of tort liability.” *Monroe v. Pape*, 365 U.S. 167, 187 (1961)(overruled on other grounds by *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 663 (1978)).

Hence, several federal courts have allowed claims for damages under Section 1983 to be tried by a jury. See, e.g., *Keller v. Prince George’s County Dep’t of Soc. Servs.*, 616 F.

Supp. 540 (D. Md. 1985) and *Gargiulo v. Delsote*, 769 F.2d 77 (2d Cir. 1985).

Citing only one decision from the United States Court of Appeals for the Eleventh Circuit that has so held, Pet. Br. 24 (citing *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1092 (11th Cir. 1996), cert. denied, 117 S.Ct. 2514 (1997)), Petitioner argues for an interpretation of Section 1983 that would bar claimants seeking relief for the taking of their property rights in violation of the Fifth and Fourteenth Amendments to be singled out under the statute for special treatment. However, nothing in Section 1983 or Seventh Amendment jurisprudence authorizes federal judges to pick and choose among constitutional claims for damages brought under Section 1983, favoring some with Seventh Amendment protections but not others.

The statute itself makes no distinction among the constitutional rights it protects. Indeed, it would appear to apply to *all* violations of *all* constitutional rights. See, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 723

(1989)(stating that Section 1983, on its face and as it was originally passed in 1871, "explicitly ordained that any 'person' acting under color of state law or custom who was responsible for the deprivation of constitutional rights would 'be liable to the party injured in any action at law.'"). Nor does the Fifth Amendment provide any basis for such a rule.

The Just Compensation Clause of the Fifth Amendment is the only express money damages provision in the Constitution (it conditions the taking of private property by government for public use upon the payment of just compensation); the state commits a legally compensable wrong when it takes property without making provision for compensation, thus violating the Constitution and giving rise to a claim for damages both under the Constitution directly and under 42 U.S.C. § 1983.

*Jacobs v. United States*, 290 U.S. 13, 16-17 (1933).

Since property rights are civil rights, no less than freedoms of speech, religion, press and assembly,<sup>4</sup> any rules

adopted by this Court concerning the right to a jury trial in actions for damages under Section 1983 (as well as other rules, such as ripeness) must be uniform among all claims brought for violation of "rights guaranteed by the Constitution" under 42 U.S.C. § 1983 if Congress' purpose in passing the statute is to be accomplished.

Accordingly, the court below properly analyzed and decided the issue of the Respondent's right to trial by jury, and this Court on review should affirm that decision.

## ARGUMENT

### I. THIS COURT HAS HELD THAT THE SEVENTH AMENDMENT'S GUARANTEE OF A RIGHT TO TRIAL BY JURY APPLIES TO ACTIONS FOR DAMAGES IN FEDERAL COURT UNDER STATUTES THAT "SOUND IN TORT."

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<sup>4</sup> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth

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Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

Although this Court has never expressly addressed the applicability of the Seventh Amendment's<sup>5</sup> guarantee to actions brought in federal court pursuant to 42 U.S.C. §1983, this Court has repeatedly held that where the claim "sounds basically in tort" and where the remedy sought is damages ("the traditional form of relief offered in the courts of law"), there is a right to trial by jury. *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974); *see also Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Tull v. United States*, 481 U.S. 412 (1987)(upholding the right to jury trial for a liability issue under Section 404 of the Clean Water Act where the government sought civil penalties); *Ross v. Bernhard*, 396 U.S. 531, 538-42 (1970)(holding that an underlying substantive corporate claim in a shareholder's derivative action was legal in nature, even though such a derivative action is historically equitable); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-73 (1962)(finding that the litigant was

entitled to jury trial even though the legal issues of the action were "incidental" to the primary equitable claim); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 503-11 (1959)(ruling that the Seventh Amendment guarantees the right to a jury trial for an antitrust counterclaim because the remedy requested was "legal" in nature).

The seminal case on this issue of the right to a trial by jury for statutory constitutional claims is *Curtis v. Loether*, 415 U.S. 189 (1974). *Curtis* involved Section 812 of Title VIII of the Civil Rights Act of 1968, enabling private plaintiffs to sue on violations of fair housing provisions. 42 U.S.C. § 3612 (1982). Congress was silent as to its intent concerning a right to a jury trial under the statute. The *Curtis* Court utilized a three-part test to determine whether the action was one sufficiently similar to an action at common law to merit a jury trial: (1) the type of relief sought; (2) the function of the action; and, (3) whether the proceeding was administrative or judicial. 9 Wright & Miller, Federal Practice and Procedure §2302.2, at 49-50 (2d ed. 1994).

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<sup>5</sup> The Seventh Amendment provides that "[I]n Suits at common law . . . the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII.

Analogizing the cause of action to one in tort, the *Curtis* Court concluded that Title VIII provides a right to a trial by jury. *Curtis*, 415 U.S. at 195, n. 10. Critical to this Court's analysis of the jury trial issue was the fact that the remedy sought – actual and punitive damages – was relief traditionally obtained in courts of law. *Id.* at 196. As Justice Marshall, writing for the Court, explained:

[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law. . . . A damages action under the statute sounds basically in tort – the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. . . . More important, the relief sought here – actual and punitive damages – is the traditional form of relief offered in the courts of law.

*Curtis*, 415 U.S. at 195-96.

In *Pernell v. Southall Realty*, 416 U.S. 363 (1974), this Court looked to the nature of the remedy (damages) as a basis upon which to decide whether the Seventh Amendment

right to a trial by jury was available under a statutory framework. *Pernell* involved a District of Columbia statute, D.C. CODE §§ 16-1051 – 1505 (1981 & Supp. 1985), that established a procedure for the recovery of possession of real property. The Court concluded that, because the relief made available by the statute (damages) was the same relief afforded by a common law action, a trial by jury was available under the statute even though Congress was silent on the issue. 416 U.S. at 383. See also *Tull v. United States*, 481 U.S. 412 (1987)(focusing on the remedy sought to determine whether there is a right to a jury trial under the Seventh Amendment).

## II. AN ACTION FOR DAMAGES UNDER 42 U.S.C. §1983 SOUNDS IN TORT.

Although this Court has never held that an action for damages under 42 U.S.C. § 1983 is entitled to a right to trial by jury, such an action satisfies the test for a trial by jury set forth by this Court in *Curtis v. Loether*, 415 U.S. 189 (1974), and *Tull v. United States*, 481 U.S. 412 (1987). See

generally 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation, The Law of Section 1983* §1:52, at 1-81 (4th ed. 1997).

First, 42 U.S.C. § 1983 creates a statutory cause of action with damages as a remedy for constitutional injuries:<sup>6</sup>

As a result of the new structure of law that emerged in the post-Civil War era – and especially of the Fourteenth Amendment, which was its centerpiece – the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the

<sup>6</sup> Although Section 1983 does not, of course, create any new constitutional rights, it does create a statutory right which would not exist in its absence. Thus, for example, a person denied due process (such as a government worker terminated without a pre-termination hearing, see *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)) would have no cause of action against the individual who committed the constitutional violation because the Fourteenth Amendment only prohibits the State, and not the individual, from denying life, liberty, or property without due process. Also, since the State is immune from suit under the Eleventh Amendment, the practical result is that no damages remedy would exist at all. This is not to say that injunctive or declaratory relief might not be available, but only that a damages remedy – at least against an individual – would not lie. Indeed, Section 1983 was passed under Section 5 of the Fourteenth Amendment, authorizing Congress to implement by statute the prohibitions on the exercise of State power contained in the Fourteenth Amendment. Consequently, the statute does not simply duplicate a legal requirement already imposed by the Constitution but, rather, creates a new statutory remedy for money damages (as well as equitable relief) against individuals and municipalities to carry out the Fourteenth Amendment's prohibitions.

claimed authority of state law upon rights secured by the Constitution . . .

*Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972)(citations omitted).<sup>7</sup>

Additionally, this Court has held that Section 1983 is to be interpreted against a “background of tort liability.”

*Monroe v. Pape*, 365 U.S. 167 (1961) overruled (on the local government immunity issue alone) by *Monell v. Department of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978).

Subsequent decisions of this Court and writings by commentators repeatedly describe the damages remedy

provided by Section 1983 as “a species of tort.” Jack M. Beermann, *Symposium on Section 1983: Common Law Elements on the Section 1983 Action*, 72 Chi.-Kent. L. Rev.

<sup>7</sup> Broad liability under Section 1983 is appropriate because as one commentator explained, “constitutional rights are basic to the maintenance of our form of limited, democratic government. That is why Congress passed the civil rights acts of the Reconstruction-era and why civil rights cases were granted a federal forum. Congress found enforcement of these rights so important that it granted plaintiffs the option of a federal forum even when the defendant could prove that an equally effective remedy was available in state court. . . .” Jack M. Beermann, *Symposium on Section 1983: Common Law Elements on the Section 1983 Action*, 72 Chi.-Kent. L. Rev. 695, 704 (1997).

695, 704 n. 29 (1997). See also *Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)(“The statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that should be applied as stringently as it reads.”); *Carey v. Piphus*, 435 U.S. 247, 253 (1978)(“The legislative history of §1983, elsewhere detailed, demonstrates that it was intended to ‘create a species of tort liability’ in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution.”)(quoting *Imbler*, 424 U.S. 409, 417 (1976)); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 723 (1989)(Section 1983 “was designed to expose state and local officials to a new form of liability.”); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981)(“Indeed, because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of §1983.”).

In *Heck v. Humphrey*, 512 U.S. 477 (1994), an action brought by a state prisoner under Section 1983 for alleged violations of his civil rights, Justice Scalia, writing for the Court, left no doubt about the relationship between Section 1983 and tort law:

We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability. . . . Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under 1983 as well. . . . Thus, to determine whether there is any bar to the present suit, we look first to the common law of tort.

*Id.* at 483 (quoting *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986), and *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)).

**III. THERE IS NO BASIS FOR DISTINGUISHING AMONG CLAIMS BROUGHT FOR VIOLATION OF “RIGHTS GUARANTEED BY THE CONSTITUTION” UNDER 42 U.S.C. § 1983.**

Unless this Court holds that there is no right to a jury trial under a Section 1983 damages action, there is no basis in either the Act or the Constitution to limit that right to only certain constitutional claims. On its face, the language of Section 1983 purports to apply to *all* claims for *all* rights guaranteed by the Constitution. *See, e.g., Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 723 (1989). The legislative history of Section 1983 also supports the conclusion that Congress fully intended for the statute to apply equally among all constitutional rights. For example, during the floor debates over Section 1 of the 1871 Act, Senator Edmund, who was then chairman of the Senate Judiciary Committee, making no distinction among the various provisions of the Constitution, simply stated: "The first section [of the Act] is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States . . ." Cong. Globe, 42<sup>nd</sup> Cong., 1<sup>st</sup> Sess., App. 68 (1871), quoted in *Monroe v. Pape*, 365 U.S. 167, 171 (1961) and *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 729 (1989). *See also Will v. Michigan Dep't*

*of State Police*, 491 U.S. 58, 66 (1989)("[A] principle purpose behind the enactment of §1983 was to provide a federal forum for civil rights claims. . . .").

If Congress' purpose in passing the statute is to be accomplished, any rules adopted by this Court concerning the right to a jury trial in actions for damages under Section 1983 (as well as other rules, such as ripeness) must be uniform among all claims brought for violation of "rights guaranteed by the Constitution" under 42 U.S.C. § 1983. Property rights are civil rights, no less than freedoms of speech, religion, press and assembly, and must not be "relegated to the status of a poor relation in these comparable circumstances."

*Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).<sup>8</sup>

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<sup>8</sup> Petitioner confuses the constitutional right to just compensation with the damages remedy under Section 1983, characterizing the 1983 claim as "inverse condemnation." As this Court has repeatedly held, however, the right to just compensation for taking of private property arises not from statutes or regulations, but from the Constitution itself. *See Jacobs v. United States*, 290 U.S. 13 (1933); *see also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 339 (1987)(Stevens, J., dissenting). Indeed, in order to bring an action for violation of the constitutional right to just compensation, the plaintiff must ordinarily first bring an inverse condemnation claim in state court to establish that state law does not in fact provide him just compensation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S.

## **CONCLUSION**

For all of these reasons, *amici curiae* urge this Court to affirm the decision below.

Respectfully submitted,

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172 (1985). Only after the plaintiff has exhausted his inverse condemnation remedy may he file a statutory claim in federal court under Section 1983 to recover damages for violation of the constitutional right to be paid for the property taken. As Petitioner itself seems to concede, if the Section 1983 remedy is merely a second, sequential inverse condemnation claim, it would always be precluded by the decision in the prior state case - leaving no 1983 remedy at all. Such an interpretation would provide a money damages remedy for every other constitutional violation committed under color of state law, excluding only the taking of private property without just compensation. Nothing in the text or history of the statute supports such an exception to the salutary requirement that state officers who deny constitutional rights should be held accountable.